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No. 89-442

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALEXIA ANDERSON, *et al.*,
Petitioners,
v.
AETNA CASUALTY AND SURETY COMPANY, *et. al.*,
Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF CERTIORARI

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1. Perhaps the most noteworthy element of the oppositions submitted by respondents Aetna Casualty and Surety Company ("Aetna") and plaintiffs Gloria Breland, *et al.* ("Breland"), is what they do not say. Like the court of appeals, they discuss at great length the interrelation between the settlement of this action and the A.H. Robins reorganization plan, including the requirement that the district court — but no other court — approve the settlement and grant mandatory class certification. However, unlike the court of appeals, respondents do not contend that the Robins reorganization plan cannot be consummated if the decision below is set aside. Since that misapprehension was the linchpin of the ruling below, respondents' silent concession directly undermines the decision of the Fourth Circuit.

2. On the Rule 23 issue, respondents essentially concede that the question presented by the petition is worthy of review by this Court, but they assert that the Court should decline to hear the case because petitioners have misread the decision below and misunderstood the facts of this case. According to respondents, this is not an ordinary case for money damages, but a case involving an insurance company whose defense is that it was simply fulfilling its duty to protect its insured. Therefore, according to Aetna, the possibility that it may be held liable for substantial money damages in some states, because it wrongfully took certain actions that it claims it was required to take in other states, is the kind of intolerable conflict that meets the "incompatible standards" test of Rule 23(b)(1)(A).

The first difficulty that respondents face is that the court of appeals made no such ruling in upholding class certification. In fact, its lengthy opinion contains not a word to support the theory set forth in respondents' oppositions. While the district court appeared to make a finding along that line, the court of appeals failed to do so, as is apparent from the contrasting rationales contained in the quotes set forth on pages 12 and 13 of the Breland opposition. Moreover, if the court of appeals thought

that this case involved a situation in which an insurance company was potentially being told to follow one rule by one state, and another rule by another, it would have been entirely unnecessary for the court to review the history of class action litigation since the 1966 amendments and to criticize and attempt to distinguish the other mass tort cases. Indeed, under the theory offered by respondents, none of those cases would be relevant at all. Thus, it is apparent that the court of appeals did not affirm the ruling below on the theory suggested by respondents here.[1]

It is hardly surprising that the court below did not rest on that theory, since this was not a typical case under Rule 23(b)(1)(A) where a plaintiff is seeking an injunction, for example, requiring a stakeholder to pay money to one group of claimants, and not to another, where varying determinations would be intolerable. While it is possible that some cases seeking only damages might qualify under Rule 23(b)(1)(A), because of the impact that the decision would have on the future conduct of the defendant, that is surely not the case here. Thus, as the court of appeals recognized (66a), this case involves a series of events that are so unique in product liability litigation that one can fairly assume that they will never be repeated, and surely not by Aetna.

Moreover, this is a case seeking damages for Aetna's past misconduct, not an action seeking to control Aetna's future conduct toward other insureds or their tort victims. To the extent that Aetna's past misconduct might be judged differently according to the laws of the various states — thereby creating varying incentives by which Aetna and other insurers might guide their future behavior — those differences in outcomes are simply an inevitable result of our system of federalism. Nothing

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[1] Contrary to Aetna's assertion at the top of page 20 of its opposition, neither reference (70a, 81a) embraces the rationale advocated by respondents here.

in Rule 23 was intended to preempt the federal system on which this Nation was formed, nor to mandate a uniform federal law of products liability or to impose a uniform duty on insurers. Until this case, no one ever has suggested such a profoundly substantive role for the procedural mechanisms of Rule 23.

There is another very strong reason why the rationale offered by respondents cannot apply in this case. Paragraphs 35 and 36 of the third amended complaint contain allegations of criminal activity, including obstruction of justice, fraud, destruction of evidence, and subornation of perjury, which, for purposes of class certification, must be assumed to be true. Thus, even if Rule 23(b)(1)(A) could be used where an insurance company feared liability from its insured for making disclosures, and at the same time feared liability from third parties for not doing so, there is no authority under which an insurance company could be held liable to its insured for what Aetna allegedly did here: commit criminal acts. Not surprisingly, that portion of the amended complaint received no mention in the briefs in opposition, nor in the class certification rulings by the district court, and only a passing reference at the end of the opinion of the court of appeals.

There is another aspect of this case that undermines respondents' characterization of the class certification ruling. Their theory might explain why a *defendant* would seek class certification in order to prevent the possibility of being "whipsawed" by conflicting rulings in different jurisdictions. But in this case, class certification was initially sought by the *plaintiffs* in their complaint, and it is obvious that, if avoiding being whipsawed is the reason why Aetna wanted class certification, plaintiffs would have had a powerful incentive to take the opposite stance, which they did not do.

Finally, even if the court of appeals had acted on the basis now relied on by respondents, that would hardly justify denying *certiorari*. At the very least, turning what appears to be an

ordinary damages action into a Rule 23(b)(1)(A) class action is a novel extension of the law, whose potential for fundamentally altering Rule 23 would itself provide a basis for granting review, especially since respondents' theory appears to have no limitations or even any guidelines for determining what kinds of possible conflicts in state substantive law would bring Rule 23(b)(1)(A) into play. Accordingly, respondents' principal defense of the ruling below does not form a basis for denial of *certiorari*.

3. Respondents also note that the complaint and arguably the district court relied on Rule 23(b)(1)(B) for mandatory certification. However, as recognized by respondents, the court of appeals did not uphold certification on that basis, and while petitioners do not object to respondents defending the judgment below on that ground, even in the absence of a cross-petition for *certiorari*, they are confident that it, too, cannot be a basis for upholding class certification.

While the district court mentioned Rule 23(b)(1)(B) in its discussion, it was only in the portion of its memorandum dealing with the insurance coverage issue (150a). Subsection (B) was never mentioned in either certification order (134a-137a), and the district court never explained how that subsection applied or on what theory it is relevant to this case. Surely, the justification advanced by respondents — that various members of the plaintiff class will be prejudiced if the settlement falls through — cannot be a proper basis for invoking subsection (B) because that would apply every time some plaintiffs wanted to settle and others did not. Whatever the limits of Rule 23(b)(1)(B) and its possible application to a limited fund, this case does not bring them into play. Thus, this reason offered for denying *certiorari* should also be rejected.

4. Much of respondents' opposition on the Due Process question is tied in with their views on Rule 23. In addition, they continue to insist that petitioners will have their full right to trial

by jury and that is all that the Due Process Clause requires. They are able to make that contention only because they continue to overlook petitioners' basic assertion that they have the right to try the merits of the liability case against Aetna. That would include obtaining a judgment for punitive damages if Aetna is found to have engaged in criminal misconduct, and the right to not be forced to accept an inadequate amount in settlement, in a case brought by others, in a forum not of petitioners' choosing.

5. Respondent Aetna also attempts to distinguish *Phillips Petroleum Corp. v Shutts*, 472 U.S. 797 (1985), on the ground that it applies only to state courts, without any explanation of why the same phrase in two amendments to the Constitution should have different meanings. Yet the only limitations announced by this Court on its holding in *Shutts* that due process requires, *at a minimum*, that individual class members be afforded the right to opt out, is that the rule applies to actions primarily seeking monetary relief. 472 U.S. at 811, n.3. But even if there were a difference between federal and state actions, an opt out would still be required for the reasons set forth on page 23 of our petition. Therefore, no matter how respondents squirm, they cannot avoid the conclusion that this is an action for money damages for which an opt out is consitutionally required.

6. The only other basis offered for denying *certiorari* on the Due Process and the Rule 23 issues is respondents' claim that petitioners will be paid in full, and hence their objections are purely theoretical. But as we explained in both the original petition in this case and the petition in *Rosemary Menard-Sanford v. A.H. Robins Co.*, No. 89-441, and again in the reply brief in that case, there is no guarantee of full payment, and the fact that the district court made a finding that there would be sufficient money in the fund does not erase petitioners' substantial doubts about the adequacy of the funding. Indeed, if there were a guarantee, both cases would long ago have been resolved, and we would not be before the Court seeking *certiorari*.

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For the foregoing reasons and those set forth in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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October 23, 1989